IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 541 OF 1996

1. Smt. Savitra Bapu Shinde age 41, Occu: Household, R/at Jakatwadi, Tal: Satara District Satara.

2. Shobha Prakash Barge age 28, Occu: Nil, R/at Koregaon, Tal: Koregaon, District Satara.

3. Nanda Ramesh Gujar age 24, Occu: Nil, R/at Kondave, Tal: Satara District Satara.

4. Nalini Sahebrao Kate age 32, Occu: Household R/at Goposhi, Tal: Patan, District Satara. .. Appellants

V/s.

1. Rau Rama Shinde, age 76 Occu: Agriculturist, R/at Jakatwadi, Tal: Satara, District: Satara.

2. Kamal Bhau Shinde, age 46 Occu: Service, R/at C/o. V.E. Chaudhari Shriram Sugar Factory, Phaltan, Dist. Satara .. Respondents

Mr. M.V. Sali for the Appellants.
Mr. P.V. Samant for Respondent No.1.

CORAM: B.H. MARLAPALLE, J.

Date : November 16, 2005.

ORAL JUDGMENT:

1. While admitting this appeal on 10/12/1996, this court framed the following two substantial questions of law:-

(a) The Lower Appellate Court erred in recording the findings of tenancy in favour of the Defendant No.1. The lower Appellate Court ought to have framed issue of tenancy and referred the same to the Tenancy Court for its decision on the same to decide as to whether it is joint family tenancy or individual tenancy, especially, when the Defendant No.1 raised an objection regarding the same in his appeal memo and pleadings of the parties are more than clear. This is a substantial question of law.

(b) The Lower Appellate Court has erred in dismissing the suit of the plaintiffs, especially when the Respondent has failed to produce evidence regarding acquisition of land out of his own earning. On the contrary he has clearly admitted in his cross-examination that he has no documentary evidence to prove his self earnings or separate income.

2. Rama Shinde, a resident of village Jakatwadi (Shahapur) Taluka and District Satara was married to Smt. Chandrabai and the couple had three sons,

namely, Rau (Defendant No.1), Bhau (the late husband of Defendant No.2) and Bapu (the late husband of Plaintiff No.1). Rama died sometimes in the year 1940 and the children were brought up by Chandrabai. Defendant No.1 was the eldest son and was about 20 years of age when his father died, whereas the husband of Plaintiff No.1 i.e. Bapu was hardly about one year's old. As per the Plaintiff on her marriage with Bapu she became a member of the joint Hindu family of Chandrabai and the Defendant No.2 was married earlier to the second son Bhau, who died within a short period of about two years after the marriage and consequently Defendant No.2 left the village after she came to be appointed as a School Teacher. The Defendant No.1 along with his family and the third son Bapu along with his family i.e. wife and three daughters continued to be the members of the joint Hindu family with Chandrabai as the Karta of the family. However, Bapu, the husband of Plaintiff No.1 died sometimes in 1977 and the Plaintiff along with her three daughters was shifted to the shed marked as Village Panchayat House No.104, but the cultivation of agricultural lands continued to be joint occupation of the family and she was being given her due share by Chandrabai

till her demise in 1980. On the demise of Chandrabai the Defendant No.1 being the eldest son took over the affairs of the family and he continued to give the plaintiff's share from the agricultural income till July 1983. However, the Defendant No.1 changed this stand and stopped giving the share to the Plaintiff No.1 from the agricultural income and, therefore, she issued a notice on 1/9/1986 seeking her share in the family property. As per the Plaintiff No.1 the Defendant No.1 orally informed her that she had no right in the suit property and she was free to take whatever steps she desired. The Plaintiff No.1, therefore, filed Regular Civil Suit No.505 of 1986 along with two of her daughters i.e. Plaintiff Nos.1a and 1b and prayed for partition of the joint Hindu family property described in para 1 of the plaint, namely;

(a) Agricultural land admeasuring 5 hectares and 4 ares located in Gat No.88/0 and agricultrual land admeasuring 52 ares located in Gat No.87/5 of village Jakatwadi.

(b) House bearing Village Panchayat No.104A

with 12 Khans and built in stone and mud which was valued at Rs.1000/-, and

(c) House bearing Village Panchayat No.104 with tin roof and built in stone and mud located in the open space of the entire property registered as House No.104A and valued at Rs.500/-.

3. Defendant No.3 is the daughter of Plaintiff No.1 and she filed her Written Statement at Exh.19 supporting the claim of partition. So also Defendant No.2 filed her Written Statement at Exh.15 and claimed her 1/3rd share in the suit properties along with the Plaintiffs. However, Defendant No.1 by filing his Written Statement at Exh.21 opposed the suit contending that the house bearing No.104A was purchased by him in the year 1946 and it was not the property of the joint family. As far as the agricultural land was concerned, he contended that it was exclusively his own property and the other brothers had no share in the same. He relied upon the certificate at Exh.34 issued under Section 32-M of the

Bombay Tenancy Act on 19/10/1978. As per him, he was in exclusive cultivation as a tenant over both the suit lands prior to 1957 and after the purchase value was assessed under Section 32-G of the Bombay Tenancy Act he was issued the ownership certificate in respect of the suit land located in Gat No.88/0, whereas the other land located in Gat No.87/5 belonged to Devasthan and he was cultivating it as a tenant. In respect of House No.104 it was contended by Defendant No.1 that in the year 1967 the husband of Plaintiff No.1 was allowed to put up a separate shed admeasuring 20 x 10 ft. and he started occupying the same as his residential dwelling along with his wife and children. In short, the Defendant No.1 claimed that the husband of Plaintiff No.1 had already separated sometimes in 1967 and the plot of land admeasuring 20 x 10 ft. from the entire house property under Village Panchayat No.104A was given by him to the husband of Plaintiff No.1. On all these grounds he prayed for the dismissal of the suit.

4. In support of the plaint the Plaintiff No.1 examined herself as P.W.1 and in contra the Defendant No.1 examined himself as D.W.1. The other Defendants

and more particularly Defendant No.2 did not step in the witness box in support of her claim for 1/3rd share in the suit property. Both the parties also placed on record documentary evidence, namely, the Sale Deed at Exh.71, Challans and Receipts at Exhs. 75 and 76, Notice dated 30/1/1975 received by the husband of Plaintiff No.1 (Exh. 85), Certificate of ownership issued under Section 32-M of the Bombay Tenancy Act at Exh.34. The trial court considered the oral as well as documentary evidence adduced by both the parties and decreed the suit with costs by its Judgment and Order dated 26/3/1990. The Defendant No.1 was ordered to effect the partition of the suit properties and to hand over 1/3rd share of Plaintiff No.1 and her three daughters as well as separate 1/3rd share to Defendant No.2 and resultantly retain with him the remaining 1/3rd share of the suit properties. He was further directed to hand over the possession of the respective shares to the Plaintiff No.1 and Defendant No.2. So far as the mesne profit was concerned, the Plaintiff No.1 was given liberty to get the Commissioner appointed to take the accounts of the same and it was directed to be decided on the basis of the said report. This decree came to be challenged in

Regular Civil Appeal No.168 of 1990 and the learned Second Additional District Judge at Satara was pleased to allow the appeal vide his Judgment and Order dated 3/4/1996 and consequently while setting aside the Judgment and Decree of the trial court the suit of the plaintiffs came to be dismissed. The Lower Appellate Court disagreed with the findings of the trial court regarding the suit properties being the joint family properties. The Lower Appellate Court held that the Defendant No.1 was alone the tenant of the suit agricultural land prior to the year 1957. Purchaser certificate under Section 32-M of the Bombay Tenancy Act was issued in his favour on 19/10/1978 i.e. after the demise of the husband of Plaintiff No.1 and the documents relied upon by the Plaintiff No.1 in support of her claim that both the brothers were cultivating the suit land and had paid the purchase price jointly were discarded by disagreeing with the view taken by the trial court. The Lower Appellate Court also disagreed with the view taken by the trial court on the house property and it held that the registered Sale Deed dated 19/2/1946 clearly went to prove the contentions of Defendant No.1 that it was the property acquired by him from his own income and it was not a

joint family property. As per the Lower Appellate Court the Plaintiff No.1 did not make out a case in the plaint that Defendant No.1 was a Karta of the joint family and, therefore, the reliance placed by the trial court on the decision in the case of Mallesappa Bandeppa Desai and anr. vs. Desai Mallappa alias Mallesappa and anr. reported in AIR 1961 SC 1268 was erroneous.

5. Thus, the substantial questions of law in this second appeal on the basis of the issues framed while admitting the same revolve around the interpretation of two documents, namely, Sale Deed (Exh.71) registered on 19/2/1946 and the purchase certificate Exh.34 dated 19/10/1978. The first is in respect of the agricultural land whereas the second issue pertains to the entire suit property.

6. The Constitution Bench in the case of Sir Chunilal V. Mehta and sons Ltd. vs. Century Spinning and Manufacturing Co. Ltd. reported in AIR 1962 SC 1314 held that the proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public

importance or whether it directly and substantially affects the rights of the parties. The documents at Exhs.34 and 71 referred to hereinabove have been interpreted by the trial court to conclude that the respective properties covered under each of them were the joint family properties, whereas the Lower Appellate Court overruled the same view and held that these documents went to prove the case of the Defendant No.1 that he was the exclusive owner of the respective properties covered by the Sale Deed and the purchase certificate, namely, the House bearing Village Panchayat No.104A and the agricultural land mentioned in para 1 of the plaint. The view taken by both the courts below has directly and substantially affected the rights of the respective parties and, therefore, interpretation of these documents is the substantial question of law in this second appeal on the basis of the issues so framed while admitting it.

7. Let it be noted at the threshold that out of the suit agricultural lands, the land located in Gat No.87/5 and admeasuring 52 ares admittedly belongs to the Devasthan and no purchase certificate has been issued in favour of Defendant No.1 under the Bombay

Tenancy Act in respect of the said property. Therefore, the same cannot be the subject matter of partition and if the plaintiff no.1 claims that she has the right to share the income from the agricultural land in Gat No.87/5 along with Defendant No.1 as a joint tenant, her remedy would lie somewhere else and it could not be the subject matter of the suit for partition. The said agricultural land in Gat No.87/5 located in village Jakatwadi will have to be, therefore, excluded from the suit properties enumerated in para 1 of the plaint and the suit will have to be considered only for the remaining properties.

8. The Sale Deed at Exh.71 goes to show that it was Defendant No.1 who purchased the house bearing No.104A and there is no dispute that house bearing No.104 is part of the entire property covered by the said document. The trial court while dealing with the said document analysed the oral and documentary evidence placed before it by both the parties and concluded that there was no material to accept the claim of Defendant No.1 that he had purchased the house from his own income. As per the trial court

both the brothers i.e. Defendant No.1 and the husband of Plaintiff No.1 were working as masons and their mother was the Karta of the family after the demise of their father in 1940. There was no independent earning earmarked of any of the brothers and all that they earned from their occupation was put into the joint stock of the family. There was no evidence to show that the brothers were residing separately and the agricultural land was cultivated by Defendant No.1 alone. The trial court referred to the documents at Exhs.75, 76 and 85 and concluded that both the brothers were jointly cultivating the agricultural land located in Gat No.88/0 and both of them had received notices from the Tahsildar separately calling upon them to remit the price fixed under Section 32-G of the Bombay Tenancy Act. These documents went to show that the husband of Plaintiff No.1 had also remitted instalments towards the purchase price from 1967 onwards and he also had received the notice from the Tahsildar calling upon him to pay the purchase price. The defence of the Defendant No.1 on this point and as has been accepted by the Lower Appellate Court was that money was paid by him to the husband of Plaintiff No.1 who in turn remitted the same and,

therefore, the receipts were issued in the name of Bapu. The Lower Appellate Court fell in grave error on this point, more so when there was no supporting evidence to accept that the Defendant No.1 paid the money to Bapu who in turn deposited the same with the Tahsildar. If that was the case, the Challans/Receipts would have been issued in the name of Defendant No.1 and not in the name of Bapu, the husband of Plaintiff No.1. There was no reason for the Tahsildar to issue the notice at Exh.85 in the name of Bapu if the agricultural land was in the exclusive tenancy of the Defendant No.1. The certificate at Exh.34 and issued under Section 32-M of the Bombay Tenancy Act could not be read in isolation and more so when the certificate was issued after the demise of Bapu. The Plaintiff No.1 being an illiterate house wife was not expected to know the ownership of the suit properties till the document came before the trial court. There was no rebuttal to her contentions that on the demise of her husband, her mother-in-law acted as a Karta of the family and she gave to Plaintiff No.1 the share from the the agricultural income till her demise in 1980. It was under these circumstances the evidence of Plaintiff

No.1 was required to be accepted on the point that the Defendant No.1 started acting as the head of the family on the demise of his mother. The Lower Appellate Court was also not right in drawing an adverse inference on the ground that no steps were taken by the plaintiff's late husband seeking the partition of the suit properties during his life time. An inference could be drawn even in support of the plaintiffs on this count by accepting the contentions of Plaintiff No.1 that till July 1983 she had no cause of action to file the suit as she was getting her due share from the suit agricultural land even after the demise of her husband as well as mother-in-law. The Lower Appellate Court also fell in grave error in holding that the plaintiff no.1 had admitted the Defendant No.1 to be the sole tenant in the suit lands prior to 1957. The averments in para 7 of the plaint have been misread by the Lower Appellate Court in this regard as is obvious from the official transaltion of the said para 7 of the plaint which reads as under:-

> "7. The property 1A mentioned in the suit was originally belonging to Pandurang Kulkarni, in the said land Defendant No.1 prior to the year 1957 and thereafter was a tenant. The price

of the said property was determined as per the Tenancy Act of the year 1957. The said price was paid by the husband of the Plaintiff and the Defendant No.1. Thus, the said land was and is purchased jointly (Joint As a property). Thereafter, even the Chavadi (Revenue) of the said land was being paid by Bapu during his life time. The property at Serial No.1A (2) was and is received as a Inam jointly to the deceased husband of the Plaintiff as well as the Defendant No.1. After his (Plaintiff's husband Bapu) death his wife that is to say the plaintiff has paid the Chavadi. The Defendant No.1 had also been paying the income yielded from the said land for the joint family till the life of Bapu. Plaintiff's deceased husband Bapu and the plaintiff herself during spare time used to help the Defendant No.1 for tilling, ploughing and for harvesting. After the death of Bapu Plaintiff's mother-in-law that is to say Chandrabai had paid the income received from the said land to the extent of Bapu's share till the year 1980. Even thereafter the income for the year from 1980 to July 1983 had and has been paid to the Plaintiff by the Defendant No.1 after the death of Chandrabai."

9. The complex of the family headed by Smt. Chandrabai is required to be considered while examining the claim on the suit land in Gat No.88/0. She had three sons and Defendant No.1 was the eldest and was about 20 years of age when his father died in 1940. There is no evidence brought on record to rebut the contentions of the Plaintiffs that Chandrabai was acting as the head of the family till her demise in 1980. It is admitted that the tenancy in respect of

the said land is prior to 1957 when Bapu, the husband of Plaintiff No.1 was a minor. The separation of the family has not been claimed by Defendant No.1 till the Plaintiff No.1 was married with Bapu. The Plaintiff No.1 in her depositions claimed that in the year 1967 her husband had received Government assistance on account of rehabilitation of earthquake affected persons and from the said money he was allowed by Defendant No.1 to construct a separate shed on the plot of land admeasuring 20 x 10 ft. and forming part of the entire house property numbered as 104A. Even if this is accepted to be the correct position, that by itself would not go to show that Defendant No.1 alone had the tenancy claim on the agricultural land located in Gat No.88/0. The documents at Exhs.75, 76 and 85 speak for themselves and the Lower Appellate Court was not right in discarding the said documents by accepting the contentions of Defendant No.1 that the money paid by Bapu towards the purchase price in instalments was in fact the money given by him to Bapu.

9A. Once the purchase certificate at Exh.34 was issued under the Bombay Tenancy Act, whether the land

was cultivated jointly or it was a joint property could not be gone into by the tenancy Court. Such a certificate could be challenged before the higher forum provided under the said Act. But it was issued after the demise of Bapu and his widow i.e. Plaintiff No.1, no reason to inspect or know whether it was issued in the joint name of two brothers or it was in the name of defendant No.1 alone. The lower appellate Court was not right in reversing the decree passed by the trial Court by holding that the trial Court was required to refer the issue of joint ownership on the land to the tenancy tribunal. The first substantial question of law stands answered accordingly in favour of the plaintiffs.

10. Now coming to the house property and more particularly the Sale Deed at Exh.71 and registered on 19/2/1946. It requires to be noted that the husband of Plaintiff No.1 was at that time nearly of about 6 years of age and the Defendant No.1 was of about 26 years of age. It is not the case of Defendant No.1 that on the demise of his father he separated from the mother and started his own dwelling. The trial court was right in holding that the Defendant No.1 failed to

prove that the house was purchased from the earnings of Defendnat No.1 alone and not from the family earnings. The contentions of the Plaintiff No.1 that Chandrabai acted as the Karta of the family till her demise could not be disproved by Defendant No.1 and if the mother acted as the head of the family till 1980 it was obvious that the Defendant No.1 took over the family affairs being the only son surviving. It would have to be safely inferred that the house was purchased by the mother and defendant no.1 being the eldest major son, the sale deed (Exh.71) was signed in his name at the instance of Smt.Chandrabai. It was under these circumstances that the trial court relied upon the decision in the case of Mallesappa Bandeppa Desai and anr. vs. Desai Mallappa alias Mallesappa and anr. (Supra) and it was, therefore, necessary for the Defendant No.1 to prove by evidence that the house was purchased from his own income in 1946 and similarly the entire purchase price for the agricultural land in Gat No.88/0 was also paid from his own income and not from the common family kitty. The trial court rightly analysed the evidence adduced by both the parties and concluded that the suit property, namely, the house bearing no.104A and the

agricultural land located in Gat no.88/0 were the joint family properties and the plaintiffs along with Defendant No.3 as also Defendant No.2 were entitled for 1/3rd share and the remaining 1/3rd share was required to be retained by Defendant No.1. The Lower Appellate Court based its conclusions on presumptions which do not find support unless corroborated by other evidence and the failure of the plaintiffs to aver in the plaint itself that the Defendant No.1 was the Karta of the family would not be fatal to her case that he took over as such only after the demise of her mother-in-law Chandrabai in 1980.

11. This appeal, therefore succeeds and it has to be held that the documents i.e. the purchase certificate at Exh.34 dated 19/10/1978 and the Sale Deed (Exh.71) registered on 19/2/1946 will have to be read in favour of the joint family and not as creating exclusive right in favour of Defendant No.1. The view taken by the Lower Appellate Court is unsustainable and, therefore, the decree passed by the trial court is required to be confirmed to the extent of the properties in para no.1A partly i.e. agricultural land located in Gat No.88/0 admeasuring 5 hectares and

4 ares and the house property mentioned in para 1B of the plaint.

12. In the premises, the appeal is allowed and the Judgment and Decree of the Lower Appellate Court is hereby quashed and set aside. The Regular Civil Appeal No.168 of 1990 here by stands dismissed and consequently Regular Civil Suit No.505 of 1986 is partly allowed. The Defendant No.1 is directed to effect the partition of agricultural land located in Gat No.88/0 and the entire house property registered as House No.104A in three equal shares and hand over 1/3rd share to the plaintiffs along with 1/3rd share of Defendant No.2. The decree be drawn accordingly.

Costs in cause.

(B.H. Marlapalle,J.)